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No. 09-1481

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CYNTHIA BRZAK, et al.,

Petitioners,

—v.—

THE UNITED NATIONS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE UNITED NATIONS IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the immunity regime created by three treaties ratified by the United States, two federal statutes, and over sixty years of uniform case law in United States courts, which confers absolute immunity on the United Nations, and functional immunity on its former high officials, compels dismissal of Petitioners' employment-related claims for lack of subject matter jurisdiction.

2. Whether the Second Circuit correctly held the recognition of the immunities at issue in this case by the political branches in treaty and statute fully comport with the U.S. Constitution.

PARTIES

Petitioners are Cynthia Brzak and Nasr Ishak. Respondent submitting this Brief in Opposition is the United Nations ("UN" or "Organization"), asserting immunities on behalf of itself and defendants Kofi Annan, Ruud Lubbers, and Wendy Chamberlin. Werner Blatter, Kofi Asomani, Raymond Hall, A.-W. Bijleveld, and Daisy Buruku were initially named as defendants in the United States District Court for the Southern District of New York, but with Petitioners' consent, were dismissed with prejudice for Petitioners' failure to effect service.

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JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on March 2, 2010. Petitioners invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) by filing a petition for a writ of certiorari on June 1, 2010. If, as Petitioners suggest, their assertion of constitutional challenges to federal statutes should be certified to the Attorney General under 28 U.S.C. § 2403(a), that requirement has been satisfied by the District Court's invitation to the United States to "brief the issue of immunity," App. 17, in response to which, and pursuant to 28 U.S.C. § 517, the United States Attorney for the Southern District of New York submitted letters dated October 2 and October 31, 2007 (reprinted in the Supplemental Appendix ("Supp. App.") at 17a and 25a, respectively). *See, e.g., Tonya K. v. Bd. of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (statute satisfied where "[t]he Executive Branch . . . has actual notice of the case and has had time to exercise its right to intervene").

TREATY AND STATUTORY PROVISIONS INVOLVED

In addition to the treaties and statutes cited and quoted by Petitioners, the Second Circuit also applied the Vienna Convention on Diplomatic Relations art. 39, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972, Supp. App. 1a, to dismiss Petitioners' complaint for lack of subject matter jurisdiction. *See* App. 9–11, 21.

STATEMENT OF THE CASE

A. The Immunities of the United Nations and Its Officials.

Article 105 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (1945), *ratified* Aug. 8, 1945 ("Charter"), provides that the United Nations "shall enjoy . . such privileges and immunities as are necessary for the fulfillment of its purposes," and that UN officials "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization." In 1946, as the Charter contemplated, the General Assembly adopted the Convention on Privileges and Immunities of the United Nations ("General Convention"), to which 157 states, including the United States, have become parties. *See* General Convention, Feb. 13, 1946, 21 U.S.T. 1418, *acceded to by the United States* Apr. 29, 1970; United Nations Treaty Collection, *Status of General Convention*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&lang=en (last visited July 1, 2010) ("*Status of General Convention*").

The General Convention defines the privileges and immunities of the Organization and its officials. As to the Organization, the treaty provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention art. II, § 2. As to the Organization's officials, the treaty provides all UN

officials with immunity "from legal process in respect of words spoken or written and all acts performed by them in their official capacity," *id.* art. V, § 18(a), and grants the Secretary-General and all officials serving at the level of Assistant Secretary-General and above ("high officials") the same "privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." General Convention art. V § 19. These diplomatic immunities are in turn specified by Articles 31 and 39 of the Vienna Convention on Diplomatic Relations ("VCDR"). By virtue of the VCDR, current high officials have absolute immunity, and former high officials enjoy continuing immunity "with respect to acts performed . . . in the exercise of [their] functions." VCDR, art. 39(2), Supp. App. 1.

By acceding to the General Convention, each party agrees that "when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention." General Convention final art., § 34. The United States acceded to the General Convention in 1970. *Status of General Convention, supra* at 2. When presenting the treaty to the Senate for its advice and consent, the Executive Branch explained that "[i]t is clear from the language of the convention, and from precedents involving similar provisions in other treaties to which the U.S. is a party, that the convention is self-executing; therefore no implementing legislation is necessary." S. EXEC. REP. NO. 91-17, at 16 (1970); *see also id.* at 5 (Senate Committee on Foreign Relations confirming self-executing character of General Convention).

In addition, the International Organizations Immunity Act, 22 U.S.C. §§ 288-288l (1945) ("IOIA"), grants the UN "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments," and provides UN officials with "immun[ity] from suit and legal process relating to acts performed by them in their official capacity and falling within their functions." 22 U.S.C. §§ 288a(b), 288d(b); *see* Exec. Ord. No. 9,698, 11 Fed. Reg. 1,809 (Feb. 19, 1946) (designating the United Nations an international organization covered by the IOIA). The Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254c (1978) ("DRA"), requires dismissal of suits against officials who are immune under the VCDR "or under any other laws extending diplomatic privileges and immunities." 22 U.S.C. § 254d.

B. The Role of the Secretary-General.

The Secretary-General is the chief administrative officer of the United Nations, Charter art. 97, and is thus "the focal point in promoting and ensuring the observance of the privileges and immunities of [UN] officials . . . by using all such means as are available to him." G.A. Res. 42/219, ¶ 11, U.N. Doc. A/RES/42/219 (Dec. 21, 1987). Section 20 of the General Convention provides the Secretary-General with "the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." The treaty further provides that the United Nations "shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the

observance of police regulations and prevent the occurrence of any abuse in connection with the [applicable] privileges, immunities and facilities." General Convention art. V § 21.

The practice of the Secretary-General in exercising his authority has been clear, consistent, and responsible. With respect to functional immunity, when a state seeks to prosecute or when a civil suit is filed against an official, the Secretary-General first determines whether the acts in question were performed in the course of official duties. If they were not, he will inform the local authorities that functional immunity does not attach. If the act has some connection to official duties, the Secretary-General will waive the immunity if he determines that continued immunity would impede the course of justice, and the immunity can be waived without prejudice to the UN's interests. *See, e.g.*, *Report of the Secretary-General on information-sharing practices between the United Nations and national law enforcement authorities, as well as referrals of possible criminal cases related to United Nations staff, United Nations officials and experts on mission*, ¶¶ 19-22, U.N. Doc. A/63/331 (Aug. 25, 2008) ("*Report of the Secretary-General*").

C. The UN's Internal Justice System.

Section 29 of the General Convention requires the Organization to "make provisions for appropriate modes of settlement of . . . [d]isputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-

General." Consistent with Section 29, the Staff Regulations promulgated by the UN General Assembly, and the Staff Rules promulgated by the Secretary-General, provide that employment-related claims shall be pursued through the UN's internal justice system. *See Staff Rules: Staff Regulations of the United Nations and Staff Rules 100.1 to 112.8*, Ch. XI, U.N. Doc. ST/SGB/2002/1 (Jan. 1, 2002), *as most recently updated by* U.N. Doc. ST/SGB/2009/6 (May 27, 2009) & U.N. Doc. ST/SGB/2009/7 (Oct. 21, 2009).

Under the former system, in effect during the period relevant to Petitioners' claims, the administration of sexual harassment claims was governed by the Administrative Instruction entitled "Procedures for Dealing with Sexual Harassment," U.N. Doc. ST/AI/379 (Oct. 29, 1992). Staff members alleging sexual harassment could make a written complaint to the Assistant Secretary-General for Human Resources Management, who was required to launch a prompt investigation into the allegations. *Id.* ¶¶ 8-9. If the Assistant Secretary-General concluded that the allegation of misconduct could not be sustained, the complainant was entitled to request review by the Secretary-General. *See* Staff Regulation 11.1; Staff Rule 111.2(a). If the Assistant Secretary-General concluded that the allegation of misconduct could not be sustained, the complainant was entitled to request review by the Secretary-General. *See* Staff Regulation 11.1; Staff Rule 111.2(a). If the Secretary-General declined to grant the requested relief, the complainant could then file an appeal with a Joint Appeals Board ("JAB"), which heard challenges to

administrative decisions and recommended dispositions to the Secretary-General. Staff Regulation 11.1; Staff Rule 111.1. A complainant dissatisfied with the JAB's recommendation and the Secretary-General's subsequent decision could initiate appeal proceedings before the United Nations Administrative Tribunal ("Administrative Tribunal"), an independent judicial body appointed directly by the General Assembly. Statute of the United Nations Administrative Tribunal, G.A. Res. 351(IV), art. 7(2) (Dec. 9, 1949), *as most recently amended by* G.A. Res. 59/283, U.N. Doc. A/RES/59/283 (Apr. 13, 2005).

The Administrative Tribunal, the highest adjudicative authority in the former system, repeatedly emphasized "the responsibility of the Organization to address" claims of sexual harassment "promptly and effectively." Judgment No. 1043, *Mink*, Judgment No. 1043 ¶ II, U.N. Doc. AT/DEC/1043 (July 23, 2002); *accord Belas-Gianou*, Judgment No. 707 ¶ IX, U.N. Doc. AT/DEC/707 (July 28, 1995). It characterized sexual harassment as "a form of prohibited gender-based discrimination," and held that the UN was obliged to examine the facts and circumstances of any case alleging sexual harassment "carefully and thoroughly," in order "to determine what, if anything, occurred and whether [the alleged conduct] constituted sexual harassment." *Claxton*, Judgment No. 560 ¶ VIII, U.N. Doc. AT/DEC/560 (June 30, 1992). Affirming that "the United Nations Charter, action by the General Assembly, and the Tribunal's jurisprudence make it crystal clear that the terms of appointment of every staff member include the

right to be free from invidious gender-based discrimination by any official of the Organization," the Administrative Tribunal noted that the UN has "strong interests in protecting staff rights," and equally strong interests "in protecting itself against the consequences of their abrogation through misconduct by officials." *Id.* ¶¶ VI-VII.

A Secretary-General's Bulletin issued on February 11, 2008 ("Bulletin") reaffirmed the Organization's commitment to policies against discrimination, harassment, and abuse of authority, such as retaliation against employees reporting misconduct. U.N. Doc. ST/SGB/2008/5. Unifying the anti-discrimination and anti-harassment policies of the United Nations in a single document, the Bulletin sets out an unequivocal standard for addressing employees' claims, explicitly stating that the Organization has a "zero tolerance" policy toward sexual harassment, and seeks to provide its employees with a safe and secure workplace. *Id.* ¶ 4.2. The Bulletin's objectives are advanced by investigative and disciplinary systems designed to function expeditiously.

As the United Nations, with the court's permission, advised the Second Circuit at oral argument, the UN's internal justice system recently has been strengthened. Transcript of Oral Argument at 21-22, *Brzak v. United Nations*, 597 F.3d 107 (May 29, 2009) (No. 08-2799-cv). For example, as of July 1, 2009, the UN Dispute Tribunal ("UNDT") replaced the JAB, and the UN Appeals Tribunal ("UNAT") was instituted as the highest decision-making body in the internal justice system. *See* G.A. Res. 62/228, ¶ 39, U.N.

Doc. A/RES/62/228 (Feb. 6, 2008); G.A. Res. 63/253, ¶ 27, U.N. Doc. A/RES/63/253 (Mar. 17, 2009). These tribunals are staffed with professional judges appointed by the General Assembly on the recommendation of the UN Internal Justice Council, a five-member body composed of one representative each from staff and management, two "distinguished external jurists" nominated by staff and management, and "a distinguished jurist chosen by consensus by the four other members" to serve as chair. U.N. Doc. A/RES/62/228 ¶¶ 36, 40. Both the UNDT and the UNAT are empowered to hear appeals of administrative decisions relating to employees' employment and may order rescission, specific performance, or compensation, and costs. U.N. Doc. A/RES/63/253, Annex I, Statute of the United Nations Dispute Tribunal arts. 2(1), 10(5); U.N. Doc. A/RES/63/253, Annex II, Statute of the United Nations Appeals Tribunal art. 9(1)-(2).

D. Proceedings Below.

After filing a motion with this Court for leave to file an original bill of complaint, which was denied without opinion, Pet. 1, and a complaint before the United States Equal Employment Opportunity Commission, which was dismissed for lack of jurisdiction, Pet. 5-6, Petitioners filed a complaint in the Southern District of New York against the UN and certain of its officials, alleging sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, violations of the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and intentional infliction of emotional distress and intentional battery in violation of state law. *See* Compl. ¶¶ 27-

59, *Brzak v. United Nations*, 551 F. Supp. 2d 313 (S.D.N.Y. May 4, 2006) (No. 06-cv-03432).

According to the complaint, Petitioners Cynthia Brzak and Nasr Ishak worked for the Office of the United Nations High Commissioner for Refugees ("UNHCR") in Geneva. Petitioners alleged that on December 18, 2003, at the end of a meeting held in the office of Ruud Lubbers and in front of other staff members, Mr. Lubbers "placed his hands on Plaintiff Brzak's waist, pulled her back towards him, pushed his groin into her buttocks and held her briefly in that position before releasing her." Compl. ¶ 19. Petitioners further alleged that Ms. Brzak filed a complaint against Mr. Lubbers and another official before the Office of Internal Oversight Services, and was consequently subjected to retaliation at work, including dissemination of her identity as a complainant, open hostility from co-workers, withholding of annual performance evaluations, verbal harassment, threats against her career, and refusal by her supervisors to assign work and responsibilities commensurate with her position. *Id.* ¶¶ 22-23. Petitioners further alleged that because Mr. Ishak urged Ms. Brzak to file a complaint, he failed to be promoted. *Id.* ¶ 24. The complaint made no specific allegations of harassment or retaliation by Mr. Annan or Ms. Chamberlin. *See id.* ¶ 25.

At the time of the acts alleged in the Complaint, Mr. Annan was Secretary-General of the UN, Mr. Lubbers was the UN High Commissioner for Refugees, and Ms. Chamberlin was a senior official in the Office of the UNHCR. *Id.* ¶¶ 10–12. None of these individuals was employed by the

United Nations at the time the District Court considered the assertions of immunity.

At least initially, Petitioners made use of the UN's internal dispute resolution mechanisms. Compl. ¶¶ 22, 23, 25; *see also* Supp. App. 8a, 15a. When review by the Secretary-General of a series of administrative decisions in her case failed to provide her with relief, Ms. Brzak exercised her right to institute an appeal against those administrative decisions, but then elected to withdraw the appeal before her submissions were complete. Compl. ¶ 25; Supp. App. 8a, 15a. Mr. Ishak has pursued his case in the UN's internal dispute system, and on July 12, 2007, the JAB concluded that his rights were violated by a lack of transparency in the promotion process. Joint App. at 173, *Brzak v. United Nations*, 597 F.3d 107 (Sept. 3, 2008) (No. 08-2799-cv). He was awarded three months' net salary in compensation. *Id.* at 176.

Petitioners purported to serve their complaint on the UN, but consistent with the Organization's regular practice, the UN formally returned all papers purporting to constitute service at UN Headquarters to the United States Mission to the United Nations. *See* Supp. App. 3a, 10a. The accom-panying letters from the UN Legal Counsel advised that "the United Nations has not waived, and indeed, expressly maintains, the privileges and immunities of the Organization and its current and former officials in respect of the above-mentioned legal proceedings." Supp. App. 9a, 15a-16a.

The UN moved in the District Court to dismiss the complaint in its entirety for lack of subject

matter jurisdiction, asserting immunities on behalf of itself and the remaining defendants, Mr. Annan, Ms. Chamberlin and Mr. Lubbers (the "Former Officials"). *See* App. 23–24 (District Court noting that "[t]he immunity at issue here is a right belonging to . . . the U.N.")[1]. In accordance with the United States's treaty obligations, the United States Attorney for the Southern District of New York submitted two letters to the District Court to explain the applicable immunities and address Petitioners' allegations that the immunities were unconstitutional. Supp. App. 17a, 25a.[2]

After briefing and argument, the District Court granted the motion of the United Nations and dismissed the entire complaint for lack of subject matter jurisdiction. App. 29. The District Court held that the claims against the United Nations should be dismissed because it had not waived its absolute immunity, and those against the Former Officials on the ground of the functional immunity conferred by treaty and statute, because all the claims against them arose in the context of the individuals' employment by the United Nations and related to acts allegedly performed by them

[1] Werner Blatter, Kofi Asomani, Raymond Hall, A.-W. Bijleveld, and Daisy Buruku were initially named as defendants in the United States District Court for the Southern District of New York, but with Petitioners' consent, were dismissed with prejudice for Petitioners' failure to effect service.

[2] Petitioners therefore misrepresent the record by asserting that a single letter simply advised the court of the U.S. Attorney's "intention to refrain from appearing in the action on behalf of the defendant United Nations, or to otherwise intervene on its behalf." Pet. 6.

while exercising their official functions. App. 24–29. The District Court reasoned that the question of whether the alleged acts relate to official functions must be "determined on the basis of whether the acts alleged occurred in the course of an official's exercise of functions, and not on the nature of the underlying conduct." App. 26. Because Petitioners' claims "are addressed against Annan only as a decisionmaker in the internal employment dispute resolution process and against Chamberlin only as a senior supervisor in the office of the UNHCR," the District Court dismissed those claims. App. 28. Equally, the District Court held, the "allegations of sexual harassment and 'indecent battery' against Lubbers are allegations of abuse of authority in the workplace," *id.*, and as such, subject to dismissal as precisely the sort of employment-related issues that "courts have consistently held . . . lie at the core of an international organization's immunity." App. 26. The District Court noted that "[w]hether Lubbers' alleged acts were intended or perceived as sexual in nature may be relevant to their wrongfulness, but not to the determination of functional immunity," App. 28, reasoning that "[i]f the rule were otherwise, routine allegations of wrongful conduct or improper motive would defeat the immunity, and the solid protection that Congress intended to afford international organizations and their officials would indeed be evanescent." App. 29 (omitting internal citation and quotation marks).

Petitioners appealed to the United States Court of Appeals for the Second Circuit. App. 2. After briefing and argument, the Second Circuit upheld Respondents' immunities and affirmed the

dismissal of Petitioners' complaint for lack of subject matter jurisdiction. App. 13. As to the claims against the Organization, the Second Circuit held that the United Nations enjoys absolute immunity under the terms of the General Convention, that it had not expressly waived that immunity, and therefore that "the district court's decision to dismiss the claims against the United Nations was correct." App. 7–8. As to the individual officials, the Second Circuit agreed with the District Court that a court assessing whether a defendant's alleged conduct falls within the scope of functional immunity "must do so without judging whether the underlying conduct actually occurred, or whether it was wrongful." App. 10. On that standard, the Second Circuit affirmed the dismissal of six of the seven claims—those alleging employment discrimination, retaliation, intentional infliction of emotional distress, and RICO violations—on the ground that those claims were based on "allegations with respect to acts that the defendants performed in exercise of their official functions," because they relate to the Former Officials' "roles as United Nations officials" or "their management of the office in which the plaintiffs worked," and "involve personnel management decisions falling within the ambit of the defendants' professional responsibilities." App. 11.

The Second Circuit did not reach the question of whether functional immunity barred the remaining claim, alleging intentional battery, but instead affirmed the dismissal on the alternative ground that there was "no colorable basis" on which the District Court could exert supplemental

jurisdiction over this state law claim when the federal claims had been dismissed before trial on jurisdictional grounds. App. 12.

Petitioners filed a petition for certiorari, which the United Nations here opposes.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Regarding the Law on the Immunities of the United Nations and Its Former High Officials.

A. The Decision Below Does Not Conflict With the Law of Any Court in The United States.

Petitioners do not identify any conflict between the decision below and the law of this Court or any other court in the United States. Petitioners do not cite a single case in which a U.S. court has refused to enforce the absolute immunity of the Organization, and Petitioners conceded in their submissions below that U.S. law confers functional immunity on all of the Former Officials for the acts alleged in the complaint:

> Plaintiffs can only lament the fact that the current state of U.S. law, as . . . applied by most American courts faced with an action against the UN or another international organization purporting to enjoy immunity from suit or process, supports the Defendant's assertion [of functional immunity].

Plaintiffs' Mem. Law in Opp. to Mot. of UN to Dismiss at 4, *Brzak v. United Nations*, 551 F. Supp. 2d 313 (S.D.N.Y. Oct. 17, 2007) (No. 06-cv-03432). Petitioners are correct: there is no disagreement among courts in the United States on the applicability and scope of the immunities at issue here, and hence no reason for this Court to grant review.

The decision below falls squarely within a body of authority spanning over six decades from courts in seven circuits that have uniformly recognized and enforced the absolute immunity of the Organization and the functional immunity of its officials. *See, e.g.*, *Van Aggelen v. United Nations*, 311 F. App'x 407, 409 (2d Cir. 2009) (affirming dismissal of action on grounds of immunity conferred by Charter, General Convention, and IOIA); *Emmanuel v. United States*, 253 F.3d 755, 756 n.2 (1st Cir. 2001) (affirming dismissal of action because the "immunity of the United Nations is absolute unless expressly waived"); *Nicol v. United Nations Missions in Liberia*, No. 09-1800, 2009 WL 2370179, at *2–*3 (E.D. Pa. July 30, 2009) (dismissing claims, citing Charter, General Convention, and IOIA); *Osman v. Annan*, No. 07-00837-CV-W-NKL, 2008 U.S. Dist. LEXIS 46667, at *3–*5 (W. D. Mo. June 16, 2008) (dismissing complaint, citing Charter, General Convention, VCDR, and DRA); *Hamrick v. Bush*, No. 1:06-CV-00044, 2007 WL 1655874, at *2 (E.D. Ark. June 4, 2007) ("The United Nations has expressly stated that it is not waiving its immunity so it must be dismissed as a defendant."); *Ashkir v. United Nations*, No. 97-2266, 1998 U.S. Dist. LEXIS 3814, at *6–*7

(D.D.C. Mar. 19, 1998) (dismissing complaint, citing General Convention); *Corrinet v. Ginns*, No. C 97-0142, 1997 WL 282149, at *4 (N.D. Cal. May 22, 1997) (dismissing suit against UN official on basis of General Convention and IOIA); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (citing General Convention, ordering complaint dismissed unless UN waives immunity); *see also Curran v. City of New York*, 77 N.Y.S.2d 206, 209 (N.Y. Sup. Ct. 1947), *aff'd*, 88 N.Y.S.2d 924 (N.Y. App. Div. 2d Dep't 1949) (given State Department's "recogni[tion] and certifi[cation of] the immunity of the United Nations and the [individual defendant] to judicial process, there is no longer any question for independent determination by this Court"); *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co., Ltd.*, 264 F. App'x 13, 15 (D.C. Cir. 2008) ("[T]he immunity conferred upon international organizations by the IOIA is absolute."); *Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 & n.7 (9th Cir. 1997) (IOIA provides functional immunity to employees of international organizations); *In re Dinastia, L.P.*, 381 B.R. 512, 524 (S.D. Tex. 2007) (dismissing complaint, citing IOIA); *Ashford Int'l, Inc. v. World Bank Group*, No. 1:04-CV-3822, 2006 WL 783357, at *2 (N.D. Ga. Mar. 24, 2006) (unless waived, defendant international organizations "are entitled to absolute immunity under the IOIA").

Ignoring this consistent body of authority, Petitioners baldly assert that these immunities are invalid because they "'are not well grounded in history and reason,' nor . . . even properly 'official,'

as the UN is neither a sovereign state nor an arm of any sovereign state." Pet. 9 (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Dostal v. Haig*, 652 F.2d 173, 177 (D.C. Cir. 1981)). As Petitioners concede, however, the cases on which they rely for this proposition discuss "the traditional and historical immunity afforded to *states* and their officials," *id.* (emphasis added), often by judicial decision-making, not the separate and distinct immunities conferred on the United Nations and its officials by treaty and statute. It is thus Petitioners, and not the Second Circuit, who "conflate" the immunity afforded international organizations, Pet. 8, with that afforded to other foreign and domestic actors, under different sources of law, and for different reasons.[3] Hence, the vast majority of the cases cited in Petitioners' brief are entirely inapposite.

In fact, Petitioners cite only two cases in which courts appear to disagree with the Second Circuit's interpretation of these immunities—*People of New York v. Coumatos*, 224 N.Y.S.2d 507, 512 (N.Y. Ct. Gen. Sess. 1962), and *County of Westchester v. Ranollo*, 67 N.Y.S.2d 31, 34 (N.Y. City Ct. 1946), in which state criminal courts declined to dismiss charges on the grounds of the immunity asserted by UN employees. *See* Pet. 15–17. Two decisions from state courts of first instance that are some fifty and sixty-five years

[3] Contrary to Petitioners' assertions, nowhere in the decisions below does the Second Circuit or the District Court invoke or otherwise rely on what Petitioners describe as "the superior doctrine of state sovereign immunity." Pet. 18 n.7 (citing academic commentary discussing immunities granted to federal and state governments or officials within the United States).

old respectively would not, in any event, provide reason to review the considered opinion of the Second Circuit. But *Coumatos* and *Ranollo* were inconsistent with authority at the time, *see Curran*, 77 N.Y.S.2d at 209, and more importantly, neither reflects current law in New York courts. *See, e.g.*, *Hunter v. United Nations*, No. 106796/04, 2004 WL 3104829 at *5 (N.Y. Sup. Ct. Nov. 15, 2004) (upholding the absolute immunity of the United Nations in a suit alleging employment discrimination); *compare Ranollo*, 67 N.Y.S.2d at 32–35 (rejecting official UN driver's assertion of immunity with regard to charge of exceeding speed limit by 10 miles per hour) *with Dostal*, 652 F.2d at 176 (noting that a foreign diplomat, enjoying the same immunities as the officials here, would be "immune from suit even though, for example, he kills or injures a U.S. citizen while recklessly driving a car").

B. The Decision Below Follows Easily From the Plain Language of the Applicable Treaties and Statutes.

There is no conflicting jurisprudence on the relevant immunities because the Second Circuit's decision is a straightforward application of the provisions of the General Convention, the VCDR, the IOIA, and the DRA, which together required the District Court to dismiss Petitioners' Complaint.

As the United States advised the District Court, the provisions of the General Convention "are binding on [U.S.] courts." Supp. App. 20a (Letter of U.S. Att'y S.D.N.Y., Oct. 2, 2007). The Second Circuit concluded, after reviewing the text

and ratification history of the General Convention, as well as the consistent and repeated assertions by the Executive Branch that the treaty is self-executing, that the General Convention "applies in American courts without implementing legislation." App. 7; *see Medellín v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) (A court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous."). Equally, the provisions of the VCDR have regularly been directly applied by U.S. courts since it entered into force in the United States in 1972. *See, e.g., Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 125–26 (D.D.C. 2009); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994), *aff'd*, 41 F.3d 1502 (2d Cir. 1994). Petitioners do not challenge these rulings.

Petitioners also do not directly challenge the propriety of the Second Circuit's application of the absolute immunity of the UN under the General Convention "from every form of legal process except insofar as in any particular case it has expressly waived its immunity." Art. II, § 2 (quoted in Pet. 2); *see Van Aggelen*, 311 F. App'x at 409 (2d Cir. 2009). There has been no express waiver in this case, App. 3, 4 (recitation of undisputed facts); to the contrary, the UN has repeatedly affirmed that it "has not waived, and indeed, expressly maintains, the privileges and immunities of the Organization and its current and former officials in respect of [these] proceedings." Supp. App. 3a, 10a (Letters from UN

Legal Counsel to U.S. diplomatic officials). *See also* App. 8 (Second Circuit rejecting Petitioners' argument, not reprised here, that "purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity," because "crediting this argument would read the word 'expressly' out of [the Convention]").

Unable to evade the plain language of the General Convention or to show an express waiver, Petitioners argue that recognition of the absolute immunity of the United Nations, and "as a practical matter, for the individual respondents as well," is somehow "contrary to the prevailing law in the United States of the restrictive theory of sovereign immunity." Pet. 16 n.6 (internal citation and quotation marks omitted). They also argue that, if recognized, the UN's immunity should be governed solely by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 *et seq.* ("FSIA"), which enacted exceptions to the immunity of foreign states. Pet. 20 n.8.

None of these issues provides occasion for review. *First*, whatever restrictions may be imposed on the immunities of foreign states, the Second Circuit correctly held that the General Convention "unequivocally grants the United Nations absolute immunity without exception." App. 9.[4] Petitioners identify no authority

[4] *Cf. Samantar v. Yousuf*, No. 08-1555, 2010 WL 2160785 at *4 *5 (U.S. June 1, 2010) (explaining that restrictive theory holds that "immunity is confined to suits involving the *foreign sovereign's* public acts, and does not extend to cases arising out of a *foreign state's* strictly commercial acts" and that the "FSIA . . . indisputably governs

suggesting otherwise. *Second*, Petitioners have presented no argument at any stage of this case to support the application of any exception to sovereign immunity, so as the Second Circuit noted, "even under [Petitioners'] interpretation" of applicable law, "the United Nations would still be immune from suit." *Id.* There is no reason for this Court to grant review to examine an argument Petitioners have never made. In any event, every U.S. court to reach the question has held that passage of the FSIA had no effect on the absolute immunity granted to international organizations under the IOIA. *Inversora Murten*, 264 F. App'x at 15; *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998); *Polak v. Int'l Monetary Fund*, 657 F. Supp. 2d 116, 120 (D.D.C. 2009); *Oss Nokalva, Inc. v. European Space Agency*, No. 08-3169, 2009 WL 2424702, at *4 (D.N.J. Aug. 6, 2009).

With respect to the Former Officials, Petitioners similarly do not directly challenge the scope of the functional immunity conferred by treaties and federal statutes upon officials of international organizations, asserting instead in conclusory fashion that the alleged conduct is outside of "official or traditional immunities." Pet. 20 (citing Executive and Legislative immunity). Petitioners have no basis for ignoring as invalid the three treaties, two statutes, and sixty years of case law that form the basis of the immunities conferred

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the determination of whether *a foreign state*," as defined by the act, "is entitled to sovereign immunity") (emphases added, internal citation omitted); *Hunter*, 2004 WL 3104829, at *5 ("[T]he United Nations is not a 'foreign state' as defined in § 1603 of the FSIA.").

upon international organizations and their officials. *See supra* Part I.A.[5] Further, as the District Court and Second Circuit recognized, the immunity scheme provided by the General Convention, the VCDR, the IOIA, and the DRA requires that the immunity of UN officials be determined on the basis of the objective circumstances of the alleged acts—whether they occur in the course of an official's exercise of functions—and not on the nature of the underlying conduct. Otherwise, under the approach urged by Petitioners, any allegation of misconduct would be outside an official's job description and defeat the immunity. The Second Circuit correctly held that in judging whether the Former Officials' alleged conduct falls within the scope of functional immunity, it "must do so without judging whether the underlying conduct

[5] Petitioners are also wrong in their argument, twice rejected below, that recognition of functional immunity in this case is unwarranted because "the United Nations is not a sovereign state and therefore its officials are not diplomatic envoys." Pet. 20 n.8; *see also* Pet. 11, 33. (They concede elsewhere in the Petition, however, that certain current employees of "[t]he United Nations and other international organizations . . . enjoy absolute immunity from such laws as if they were the diplomatic envoys of sovereign states." Pet. 15.). Petitioners' further assertion that "[t]he respondents are not the type of officials customarily afforded immunity," Pet. 9, is equally wrong. The former officials indisputably fall within the category of officials who enjoy absolute immunity while they are in their positions, and functional immunity thereafter. *See* App. 9-10, 21; *D'Cruz v. Annan*, No. 05 Civ. 8918, 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005) (holding that current and former UN officials, including one of the named defendants, are immune from employment discrimination and retaliation claims); *accord McGehee v. Albright*, 210 F. Supp. 2d 210, 217-18 (S.D.N.Y. 1999).

actually occurred, or whether it was wrongful," and appropriately affirmed the dismissal of the employment discrimination, retaliation, intentional infliction of emotional distress and RICO violations claims as allegations concerning the employment relationship. App. 10–11.

Finally, the Second Circuit upheld the dismissal of the remaining claim, that of intentional battery, on an alternative ground of lack of subject matter jurisdiction, "without reaching Brzak's argument that the claim involves conduct outside the scope of the defendant's immunity." App. 12. Specifically, the Second Circuit held that "there was no colorable basis for the district court to exercise supplemental jurisdiction over her state law claim" when the federal claims were appropriately dismissed on immunity grounds. *Id.* Petitioners do not challenge that ruling. Hence, contrary to their suggestion, *see* Pet. 19, even if the Court were to grant on either of the questions presented, it would have no basis to consider the question whether the alleged conduct underlying the intentional battery claim falls within the scope of functional immunity.[6]

[6] In any event, the District Court was correct to hold that functional immunity barred Ms. Brzak's battery claim. As the District Court noted, the allegations against Mr. Lubbers of sexual harassment and "indecent battery" in the form of unwanted contact in the course of a meeting within UN offices in Geneva are allegations of "abuse of authority in the workplace." App. 28. Such allegations of abuse of authority are precisely the sort of employment-related issues that "courts have consistently held . . . lie at the core of an international organization's immunity." App. 26; *see Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) ("One of the most important protections granted to international

C. These Treaties and Statutes Reflect Considered Policy Determinations By the Executive and Legislative Branches That Must Be Respected.

The immunities granted to the United Nations and its officials under the General Convention, which are mirrored in U.S. statutes, reflect considered policy decisions by the 157 states that have acceded to the treaty, including the United States, that the Organization cannot fulfill its mandate without these protections. These policy considerations—constitute the object and purpose of the treaty, confirm the correctness of the Second Circuit's rejection of Petitioners' arguments, and should not be thrown into question by this Court.

International organizations would be simply unable to function independently if they or their

organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship."). Petitioners also misstate the decision below when they contend that the Second Circuit ruled that "the individual respondents' tortious behavior . . . must be ultimately reviewed by the [trial] court after at least some preliminary discovery to see to what degree of immunity, if any, it is entitled." Pet. 17 n.6. In fact, after affirming dismissal of the battery claim without considering Ms. Brzak's immunity argument, the Second Circuit noted that if she re-files in state court, "the state court would need to adjudicate *in the first instance* the defendant's claim of immunity." App. 12 (emphasis added). *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (immunity doctrine is jurisdictional in nature); *accord* Supp. App. 20a (Executive Branch's explanation that "these immunities . . . are intended to shield the UN and its officials from the burdens of litigation, [so] the question of immunity should be decided at the outset, as a jurisdictional matter"), *De Luca*, 841 F. Supp. at 533 n.1.

officials were subject to the jurisdiction of domestic courts in the countries in which they operate. The national laws of the many states in which the UN operates will vary widely, often conflicting with the laws of other Member States, or even offending their fundamental policies. Likewise, the legal systems of those many states will also vary widely, both in procedure and, at least in the view of some Member States, reliability and impartiality. For example, even where there may be agreement on a specific norm, the procedures by which it is enforced in a particular legal system may be viewed by other states as burdensome, unfair, or misguided as a matter of policy, and the sanctions and remedies available may also reflect widely varying approaches.

One of the primary purposes of the General Convention is thus to "give the [UN], in every Member State, a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its functions" with independence and impartiality. Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record 10 January–14 February 1946, at 452 (remarks of the United Kingdom representative, urging adoption of resolution proposing General Convention). *Accord Mendaro*, 717 F.2d at 616 ("the very structure of an international organization . . . requires that the organization remain independent from the intranational policies of its individual members").

These objectives apply with special force to disputes arising from UN officials' employment.

Given the wide range of issues and approaches, in few if any areas will the variety of national laws be greater than in employment regulation. Given the potential for employee grievances in any organization employing over 100,000 persons worldwide, in few if any areas would the potential administrative burden of defending against employee complaints in national courts be greater. *See Broadbent v. Org. of Am. States*, 628 F.2d 27, 35 (D.C. Cir. 1980) ("Denial of immunity" for employment claims against international organizations "opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies . . . [thereby] [u]ndercutting uniformity in the application of staff rules . . . [and] undermin[ing] the ability of the organization to function effectively."); *Hunter*, 2004 WL 3104829, at *4 ("an international organization's self regulation of its employment practices is an activity essential to the 'fulfillment of its purposes,' and thus an area to which immunity must extend") (quoting Charter art. 105).

Petitioners' argument that "[t]here is no compelling jurisprudential or policy reason why a collection of states acting through an international organization should require substantially broader immunity than its member states enjoy when they act alone," Pet. 8, fails to acknowledge any of these considerations. Moreover, their contention has been explicitly rejected by U.S. courts, which have emphasized that "the United Nations is not a foreign state," *Hunter*, 2004 WL 3104829, at *5, that its

activities "are designed to resolve problems spanning national boundaries, with a benefit to be reaped collectively by [its] member nations," *Mendaro*, 717 F.2d at 619, and that its immunities are "rooted in the need to protect international organizations from unilateral control by [any particular] member nation over [such activities] within its territory." *Id.* at 615.

Petitioners also disregard the fact that the UN's immunity from civil suit in domestic courts is not immunity from liability, and does not mean that any and all criminal activity will escape sanction. *See* Pet. 18–19. In addition to granting immunity, the General Convention also requires the UN to provide "appropriate modes of settlement of . . . disputes involving any official . . . who by reason of his official position enjoys immunity" that has not been waived. General Convention art. VIII § 29. Employee complaints are addressed through the alternative dispute resolution procedures made available in the internal justice system.[7] *See supra* at 5 9. Moreover, the treaty directs the UN to "cooperate at all times" with domestic law enforcement to "prevent the occurrence of any abuse in connection with" these immunities, General Convention art. V § 20, and requires the Secretary-General "to waive the immunity of any

[7] These internal mechanisms for the resolution of employment-related claims were in place at the time of the events underlying Petitioners' complaint, and were used by Petitioners, at least initially. *See supra* at 11. Petitioners' own experience thus belies their argument that "[t]here is simply no alternative forum" for their claims, Pet. 24, and that "the immunity granted under the Convention and the IOIA . . . closes off all avenues of relief for a party in [their] position." Pet. 23.

official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to [the UN's] interests," *id.* § 21.[8] *See supra* at 4–5.

In acceding to the General Convention, and passing domestic legislation to enforce international organization immunities, the Executive and Legislative Branches have determined that absolute and functional immunities are necessary to secure the independence of the UN and its officials from regulation under national law, and relieve them of exposure to litigation in U.S. courts. *See, e.g.*, S. Exec. Rep. No. 91-17, at 8 (1970) (even before accession to the treaty,

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[8] Petitioners' assertion that the decision below "would lead to the absolute bar of criminal action or resulting civil process even when an international organization official commits or condones rape or murder on U.S. soil," Pet. 18, thus misrepresents not only the UN's obligations under the General Convention, but also the official policy of the Organization and its record of responsible cooperation with national authorities. *See, e.g., Report of the Secretary-General*, ¶¶ 12–13, 25 (explaining that "credible allegations that reveal that a crime may have been committed by United Nations officials . . . are ordinarily brought to the attention of the Member State having jurisdiction over the alleged conduct," and that the Secretary-General will waive the individuals' immunity if it will not prejudice the UN's interests); Press Release, UN News Centre, *Acting on new Oil-for-Food report, Annan lifts official's immunity, pledges further steps* (Aug. 8, 2005), http://www.un.org/apps/news/printnewsAr.asp?nid=15662; Press Release, U.S. Att'y S.D.N.Y., *U.S. Judge Sends Former High-Ranking United Nations Official to Prison for Money Laundering* (Oct. 12, 2007), www.justice.gov/usao/nys/pressreleases/October07/kuznetsovsentencingpr.pdf (thanking "the United Nations Office of Legal Affairs and Office of Investigative Oversight Services for their cooperation").

"[m]any of these privileges and immunities [we]re already enjoyed under the [IOIA] and under the headquarters agreement between the United States and the [UN]"); *see also id.* at 12 ("[T]he convention is on solid ground in making clear that the immunities are granted so that the [UN] can operate effectively" and in "requir[ing] the [UN] to cooperate in facilitating the administration of justice . . . ."). Petitioners are simply unhappy with the basic policy judgments made by the Executive and Legislative Branches that are reflected in the General Convention and the federal statutes applicable here. That unhappiness provides no reason to grant review.

II. The Immunities at Issue Confront No Constitutional Bar, and No Court in the United States Has Suggested Otherwise.

Faced with the settled framework of immunity created by three ratified treaties, two federal statutes, and consistent enforcement by courts for over sixty years, Petitioners ask this Court to grant review in order to consider whether that framework comports with the right to access the courts guaranteed by the First, Fifth, and Fourteenth Amendments and the prohibition on the taking of private property without compensation imposed by the Fifth Amendment. Pet. 10, 12, 22–32. Petitioners provide no basis on which this Court might do so.

Petitioners assume that they have a right to pursue their claims in a U.S. court, and that any doctrine that defeats that right—even if otherwise lawful—is unconstitutional. *See, e.g.*, Pet. 25–26 (asserting putative property right in claims). As

the Second Circuit explained, however, "[e]ach of these arguments fails, as each does no more than question why immunities in general should exist." App. 12. There is no reason for this Court to consider that question, for, as the Second Circuit also observed, "immunities of one sort or another . . . are firmly embedded in American law." *Id.* As the United States advised the District Court, if dismissal on grounds of Respondents' immunities violated the Constitution, "no form of immunity would be constitutionally permissible—an absurd result given that concepts of immunity are well-established fixtures of our law and essential, in particular, for the conduct of international relations." Supp. App. 27a.

Petitioners cite no case that challenges this settled understanding. Specifically, Petitioners cite no case in which any court has held that the immunities granted to the United Nations or its officials—or indeed, any international organization—compromise constitutional protections. This inability to find case support is unsurprising, as courts have routinely refused to entertain any constitutional challenge to these and other immunities. *See Veiga v. World Meteorological Org.*, No. 08-3999-cv, 2010 WL 726518, at *1 (2d Cir. Mar. 3, 2010) (quoting App. 12–13); *Weinstock v. Asian Dev. Bank*, No. 105-CV-00174, 2005 WL 1902858 (D.D.C. July 13, 2005) ("It is axiomatic that Congress can limit the jurisdiction of the lower federal courts. . . . One method . . . which it employs quite frequently, is to provide by statute that . . . certain entities are immune from suit in the district courts."); *see also Dostal*, 652 F.2d at 176 ("due process is not infringed by the proper enjoyment of immunities derived from lawful

sources"); *Sabbithi*, 605 F. Supp. 2d at 129 ("Plaintiffs' constitutional claims must also give way to defendants' diplomatic immunity."). In some cases, courts have ignored such meritless arguments entirely. *See* App. 24–30; *Van Aggelen*, 311 F. App'x at 409 (upholding dismissal of employment action against the UN and its officials on immunity grounds, and rejecting remaining arguments, including those invoking the First, Fifth, and Fourteenth Amendments, as "without merit"); *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549–50 (D.C. Cir. 1981) (upholding immunity granted under IOIA without addressing Fifth and Fourteenth Amendment claims).

The cases Petitioners do cite provide no support for their arguments. *First*, the law governing the immunities of the United States, its political subdivisions, and their officials, *see* Pet. 10–11, 29 n.10, is irrelevant to the immunities conferred on the UN and its former officials, which are governed by the treaties and statutes discussed above. *See supra* at 1–5, 15; *Van Aggelen*, 311 F. App'x at 409; *Ashkir*, 1998 U.S. Dist. LEXIS 3814, at *3–*4. *Second*, Petitioners seek to avoid the implications of the cases it cites by ignoring or misrepresenting their holdings. For example, Petitioners contend that "this case provides the ideal forum . . . to finally resolve the access-to-courts issue that *Christopher* [*v. Harbury*, 536 U.S. 403 (2002)] described as being unsettled." Pet. 24; *see also* Pet. 22 (asserting that "*Christopher* recognized that the right to access courts is still 'unsettled'," citing 536 U.S. at 415 n.12). In the very passage Petitioners cite, however, this Court reaffirmed that the right (if not its precise textual basis) was already well

settled, and emphasized that there is no breach if there is no viable underlying claim. 536 U.S. at 415 (emphasis added, internal citation omitted); *see also id.* at 413 nn. 7–8 (citing cases decided by this Court and several Circuits between 1956 and 1998).

Petitioners ask this Court to grant review in order to rule that the United States cannot accede to treaties conferring immunities; that Congress cannot pass domestic statutes recognizing these immunities; and that these treaties and statutes are therefore unenforceable in American courts. These frivolous contentions provide no basis for this Court's review. *See* App. 12–13; *see also* Supp. App. 27a.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Vienna Convention on Diplomatic Relations art. 39, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *entered into force for the United States* Dec. 13, 1972

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resi-

dent in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

[Letterhead of United Nations]

15 May 2006

Excellency,

Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States—Cynthia Brzak and Nasr Ishak v. United Nations, et al.

Complaint in the United States District Court for the Southern District of New York—Cynthia Brzak and Nasr Ishak v. United Nations, et al.

I write to inform you that the United Nations has received, via courier, the above "Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States" filed by Ms. Cynthia Brzak and Mr. Nasr Ishak against the United Nations, et al.

In addition, it has been brought to our attention that Ms. Brzak and Mr. Ishak have also filed the above-mentioned Complaint in the United States District Court for the Southern District of New York, a copy of which is enclosed.

His Excellency
Mr. Alejandro D. Wolff
Deputy Permanent Representative of the United States of America to the United Nations
New York, NY

With the present letter, I hereby return the original affidavit of service and proof of service with respect to the Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States, and request the competent United States authorities to take appropriate action to ensure respect for the privileges and immunities of the Organization and its current and former officials, in accordance with the obligations of the United States under both international and United States law.

As you are aware, the United Nations is an international inter-governmental organization established pursuant to the Charter of the United Nations (hereinafter referred to as "the UN Charter"), a multilateral treaty signed on 26 June 1945. The UN Charter was ratified by the United States of America on 8 August 1945 and came into force in the United States on 28 October 1945. *See* UN Charter, 59 Stat. 1031 (1945), *reprinted* in 1945 U.S. Code Cong. & Admin. News, 961 et seq.

Pursuant to Article 105, paragraph 1 of the UN Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities that are necessary for the fulfillment of its purposes." Article 105, paragraph 3 stipulates that "[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 . . . of this Article or may propose conventions to the Members of the United Nations for this purpose." UN Charter, Art. 105, 1945 U.S. Code Cong. & Admin. News, at 985.

In order to give effect to Article 105 of the UN Charter, the General Assembly of the United

Nations adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter, "the General Convention") on 13 February 1946. 1 U.N.T.S. 15 (1946). The United States of America acceded to the General Convention on 29 April 1970. 21 U.S.T, at 1418; [1970] TIAS No. 6900.

With respect to the privileges and immunities of the organization, Article II, Sections 2 and 3, of the General Convention provide:

> "SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."
>
> "SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action."

Before ratifying the General Convention, the United States of America enacted the International Organizations Immunities Act ("IOIA"). Pub.L.No. 291, 79th Cong., 1st Sess., 29 December 1945 (codified at 22 U.S.C. § 288 *et seq.*). In accordance with the provisions of Title I, Section 1 of the IOIA, 22 U.S.C § 288, the President of the United States in 1946 designated the United Nations as an "international organization" enti-

tled to the privileges and immunities, facilities and exemptions specified in the IOIA, Ex. Ord. No. 9698, 11 F.R., 1809 (19 Feb. 1946).

Pursuant to Article V, Section 19 of the General Convention, the Secretary-General, Mr. Kofi Annan, and the former Under-Secretary-General, Mr. Ruud Lubbers, both of whom are named as defendants in the above proceedings, enjoy "the privileges and immunities, exemptions and facilities accorded to diplomat envoys, in accordance with international law." Pursuant to Article 31 of the Vienna Convention on Diplomatic Relations (hereinafter, "the Vienna Convention"), 500 UNTS 95 (18 April 1961), which entered into force with respect to the United States on 13 December 1972, 23 U.S.T. 3227; TIAS No. 7502, diplomatic envoys enjoy immunity from criminal, civil and administrative jurisdiction of the host country.

Under United States law, any action brought against an individual entitled to immunity under the Vienna Convention must be dismissed. Pursuant to 22 U.S.C.A, Section 254(d):

> "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under Section 254(b) or 254(c) of this Title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure" (emphasis added).

In addition to the diplomatic immunities under the Vienna Convention enjoyed by the Secretary-General, Mr. Kofi Annan and the former Under-Secretary-General, Mr. Ruud Lubbers, they and the other current and former officials of the Organization named in the proceedings, particularly Wendy Chamberlin, Werner Blatter, Kofi Asomani, Raymond Hall, A.-W.Bijleveld, Daisy Buruku, pursuant to Article V, Section 18(a) of the General Convention, are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". Under Section 34 of the General Convention, the Government of the United States is under obligation to be "in a position under its own law to give effect to the terms" of the General Convention.

As you are no doubt aware, the Courts of the United States have consistently recognized the privileges and immunities of the United Nations and its officials. (*See, e.g., Baley v. United Nations* 159 F. 3d 1345, 1998 WL 536759 (2d Cir. (N.Y.)); *Corrinet v. United Nations, et. al.*, No. 95-CV-00426-SAW, slip op. (N.D. Cal. September 17, 1996), *aff'd*, No. 96-17130, slip op. (9th Cir. August 28, 1997), *cert. denied* 522 U.S. 1091, 118 S.Ct. 882 (1998); and *DeLuca v. United Nations, et al.*, 841 F. Supp. 531, *aff'd*. 41 F.3d 1502 (2d Cir. 1994, *cert. denied* 514 U.S. 1135, 115 S.Ct. 1429 (1995). In addition, the United States Supreme Court has previously denied a motion to bring an original action in that Court against the Secretary-General of the United Nations. *See Corriner v. Boutros Ghali*, 516 US. 1039, 116 S.Ct. 694(mem.), 133 L. Ed. 2d 653 (1996).

Regarding the legal action brought by Ms. Brzak and Mr. Ishak, it should be noted that all of the acts alleged against the Organization and its current and former officials by the plaintiffs concern their employment with the United Nations. In this respect, pursuant to Article 101, paragraph 1 of the UN Charter, the staff of the Organization are appointed under regulations established by the General Assembly. Article XI of the Staff Regulations of the United Nations provides procedures for the exclusive remedy concerning allegations of non-observance of the terms and conditions of employment with the United Nations.

In accordance with Article XI of the Staff Regulations of the United Nations, Ms. Brzak requested a review of the administrative decision in her case, and on 18 October 2004, filed an appeal with the Geneva Joint Appeals Board. However, by letter dated 3 November 2004, Ms. Brzak's counsel advised the Geneva Joint Appeals Board of Ms. Brzak's decision to withdraw her appeal.

Mr. Ishak has also availed himself of the above-referenced procedures to file an appeal in connection with his claim that the Organization failed to observe the terms and conditions of his employment with the Office of the United Nations High Commissioner for Refugees. His appeal remains pending.

Thus, Ms. Brzak and Mr. Ishak are not devoid of a remedy to address their grievances. Indeed, both of them availed themselves of the recourse procedures established under the United Nations Regulations to address their claims.

Based on the foregoing, I wish to advise that the United Nations has not waived, and indeed, expressly maintains, the privileges and immunities of the Organization and its current and former officials in respect of the above-mentioned legal proceedings. As such, I herewith return the affidavit of service of the Plaintiff's Motion for Leave to File a Complaint in an Original Action in the Supreme Court of the United States.

In addition, I respectfully request the Government of the United States to take appropriate steps to ensure that the privileges and immunities of the United Nations and its current and former officials are respected in relation to these actions.

Please accept, Excellency, the assurances of my highest consideration.

/s/ N. MICHEL
Nicolas Michel
Under-Secretary-General for
Legal Affairs
The Legal Counsel

cc: Mr. William K. Suter
Clerk of the United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Honorable Robert W. Sweet
United States District Judge
United States District Court for the
Southern District of New York
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street, Room 1920
New York, NY 10007-1312

[LETTERHEAD OF UNITED NATIONS]

19 October 2006

Excellency,

Complaint in the United States District Court for the Southern District of New York—Cynthia Brzak and Nasr Ishak v. United Nations, et al, Docket No. 06 CV 3432

Further to my letter of 15 May 2006 addressed to His Excellency, Mr. Alejandro D. Wolff (copy attached) I write to inform you that on 18 October 2006 the United Nations received a summons to appear in a civil case before the United States District Court for the Southern District of New York in the above-mentioned matter. With the present letter, I hereby return the documents sent to the United Nations and request the United States to take appropriate action to ensure respect for the privileges and immunities of the Organization and its current and former officials in accordance with the obligations of the United States under both her national and United States law.

His Excellency
Mr. John R. Bolton
Permanent Representative of the United States
to the United Nations
New York

As you are aware, the United Nations is an international inter-governmental organization established pursuant to the Charter of the United Nations (hereinafter referred to as "the UN Charter"), a multilateral treaty signed on 26 June 1945. The UN Charter was ratified by the Government of the United States of America on 8 August 1945 and came into force in the United States on 28 October 1945. *See* UN Charter, 59 Stat. 1031 (1945), *reprinted* in 1945 U.S. Code Cong. & Admin. News, 961 et seq.

Pursuant to Article 105, paragraph 1 of the UN Charter, "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities that are necessary for the fulfillment of its purposes." Article 105, paragraph 3 stipulates that "[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraph 1 . . . of this Article or may propose conventions to the Members of the United Nations for this purpose." UN Charter, Art. 105, 1945 U.S. Code Cong. & Admin News, at 985.

In order to give effect to Article 105 of the UN Charter, the General Assembly of the United Nations adopted the Convention on the Privileges and Immunities of the United Nations (hereinafter, "the General Convention") on 13 February 1946. 1 U.N.T.S. 15 (1946), General Convention, Art. II, 21 U.S.T. at 1422. The United States of America acceded to the General Convention on 29 April 1970. 21 U.S.T. at 1418; [1970] TIAS No. 6900.

With respect to the privileges and immunities of the Organization, Article II, Sections 2 and 3, of the General Convention provide:

> "SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."
>
> "SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action."

Before ratifying the General Convention, the United States of America enacted the International Organizations Immunities Act ("IOIA"). Pub.L.No.291, 79th Cong., 1st Sess., 29 December 1945 (codified at 22 U.S.C. § 288 *et seq.*). In accordance with the provisions of Title I, Section 1 of the IOIA, 22 U.S.C § 288, the President of the United States in 1946 designated the United Nations as an "international organization" entitled to the privileges and immunities, facilities and exemptions specified in the IOIA, Ex. Ord. No. 9698; 11 F.R. 1809 (19 Feb. 1946).

Pursuant to Article V, Section 19 of the General Convention, the Secretary-General, Mr. Kofi

Annan, and the former Under-Secretary-General, Mr. Ruud Lubbers, both of whom are named as defendants in the above proceedings, enjoy "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law." Pursuant to Article 31 of the Vienna Convention on Diplomatic Relations (hereinafter, "the Vienna Convention"), 500 UNTS 95 (18 April 1961), which entered into force with respect to the United States on 13 December 1972, 23 U.S.T. 3227; TIAS No. 7502, diplomatic envoys enjoy immunity from criminal, civil and administrative jurisdiction of the host country.

Under United States law, any action brought against an individual entitled to immunity under the Vienna Convention must be dismissed. Pursuant to 22 U.S.C.A, Section 254(d):

> "Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under Section 254(b) or 254(c) of this Title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure" (emphasis added).

In addition to the diplomatic immunities under the Vienna convention enjoyed by the Secretary-General Mr. Kofi Annan and the former Under Secretary-General, Mr. Ruud Lubbers, they and the other current and former officials of the Orga-

nization named in the proceedings, particularly Wendy Chamberlin, Werner Blatter, Kofi Asomani, Raymond Hall, A.-W.Bijleveld, Daisy Buruku, pursuant to Article V, Section 18(a) of the General Convention, are "immune from legal process in respect of words spoken or written, and all acts performed by them in their official capacity". Under Section 34 of the Geneva Convention, the Government of the United States is under obligation to be "in a position under its own law to give effect to the terms" of the General Convention.

As you are no doubt aware, the Courts of the United States have consistently recognized the privileges and immunities of the United Nations and its officials. (*See, e.g., Baley v. United Nations* 159 F. 3d 1345, 1998 WL 536759 (2d Cir. (N.Y.)); *Corrinet v. United Nations, et. al.*, No. 95-CV-00426-SAW, slip op. (N.D. Cal. September 17, 1996), *aff'd.* No. 96-17130, slip op. (9th Cir. August 28, 1997), *cert. denied* 522 U.S. 1091, 118 S.Ct. 882 (1998); and *Deluca v. United Nations, et al.*, 841 F. Supp. 531, *aff'd.* 41 F.3d 1502 (2d Cir. 1994, *cert. denied* 514 U.S. 1135, 115 S.Ct. 1429 (1995). In addition, the United States Supreme Court has previously denied a motion to bring an original action in that Court against the Secretary-General of the United Nations. *See Corriner v. Boutros Ghali*, 516 U.S. 1039, 116 S.Ct. 694(mem.), 133 L. Ed. 2d 653 (1996).

Regarding the legal action brought by Ms. Brzak and Mr. Ishak, it should be noted that all of the acts alleged against the Organization and its current and former officials by the plaintiffs concern

their employment with the United Nations. In this respect, it should be noted that pursuant to Article 101, paragraph 1 of the UN Charter, the staff of the Organization are appointed under regulations established by the General Assembly. Chapter XI of the Staff Regulations of the United Nations provides procedures for the exclusive remedy concerning allegations of non-compliance with the terms and conditions of employment with the United Nations.

In accordance with Article XI of the staff Regulations of the United Nations, Ms. Brzak requested a review of the administrative decisions in her case, and on 18 October 2004, filed an appeal with the Geneva Joint Appeals Board. However, by letter dated 3 November 2004, Ms. Brzak's counsel advised the Geneva Joint Appeals Board that Ms. Brzak had decided to withdraw her appeal.

Mr. Ishak has also availed himself of the above-mentioned procedures to file an appeal in connection with his claim that the organization failed to observe the terms and conditions of his employment with the office of the United nations High Commissioner of Refugees. His appeal remains pending.

Thus, Ms. Brzak and Mr. Ishak are not without a remedy to address their grievances. Indeed, both of them availed themselves of the procedures established under United Nations Regulations to address their claims.

As such, I wish to advise that the United Nations has not waived, and indeed, expressly

maintains, the privileges and immunities of the Organization and its current and former officials in respect of the above-mentioned legal proceedings. Accordingly, I herewith return the summons, complaint and certification of service, and respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations and its current and former officials are maintained in respect of these actions.

Please accept, Excellency, the assurances of my highest consideration.

/s/ N. MICHEL
NICOLAS MICHEL
Under-Secretary-General for
Legal Affairs
The Legal Counsel

Enclosure.

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK]

October 2, 2007

BY HAND
The Honorable Robert W. Sweet
United States District Judge
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street, Room 1920
New York, New York 10007-1312

Re: *Brzak, et al. v. United Nations, et al.*,
06 Civ. 3432 (RWS)

Dear Judge Sweet:

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this letter in connection with the above-referenced case, brought against the United Nations ("U.N.") and several former U.N. officials. In accordance with the United States' treaty obligations to respect the immunities of the U.N. and its officials, we explain those immunities herein, and we further relay to the Court the U.N. Secretary-General's position on the application of those immunities to the plaintiffs' allegations.[1]

[1] 28 U.S.C. § 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

I. Background

Plaintiffs filed their complaint on May 4, 2006. *See* Complaint (attached hereto at Tab A). According to the complaint, plaintiffs—Cynthia Brzak, a citizen of the United States, and Nasr Ishak, a French and Egyptian national—are both employed by the Office of the U.N. High Commissioner for Refugees ("UNHCR"), located in Geneva, Switzerland. *See id.* ¶¶7-8. Brzak alleges that she was grabbed in a sexual manner by defendant Ruud Lubbers at the conclusion of a business meeting in Lubbers' office in Geneva in December 2003. *See id.* ¶19. Lubbers was the U.N. High Commissioner for Refugees at the time and remained in that capacity until February 2005. *See id.* ¶11. Brzak alleges that she sought advice on how to respond to the alleged incident from plaintiff Ishak (who worked in the UNHCR Inspector General's office), and that Ishak advised Brzak to file a complaint with the U.N.'s Office of Internal Oversight Services ("OIOS"). *See id.* ¶21. Brzak filed an OIOS complaint on April 27, 2004. *See id.* ¶22. Thereafter, she alleges, Lubbers and other superiors retaliated against her by, among other things, displaying open hostility toward her, verbally harassing her, and giving her unmanageable work assignments. *See id.* ¶¶23, 25. Ishak similarly claims that, after it became known that he had counseled Brzak to file an OIOS complaint, he was not given a promotion for which he had been recommended, and that Lubbers attempted to abolish the office to which Ishak was attached. *See id.* ¶24. Plaintiffs allege that the OIOS issued a report that confirmed Brzak's allegations, but that the report's findings were subsequently rejected

by the U.N. Secretary-General, who was Kofi Annan at the time. *See id.* ¶¶ 22, 25. According to the complaint, Brzak filed a formal appeal from the Secretary-General's decision within the U.N.'s internal dispute resolution system, *see id.*,[2] but the complaint does not indicate that Brzak pursued the appeal process to completion. Nor does the complaint indicate whether plaintiff Ishak availed himself of the U.N.'s internal dispute resolution system to any extent.

Plaintiffs assert causes of action principally under Title VII, as well as causes of action for intentional infliction of emotional distress, indecent battery, and civil RICO violations. *See id.* ¶¶ 27-59. The U.N. itself and eight individual U.N. officials were initially named as defendants. *See id.* ¶¶ 9-17. By letter dated July 11, 2007, plaintiffs represented to the Court that they had effected service on four defendants—the U.N., Kofi Annan, Ruud Lubbers, and Wendy Chamberlin, who was Deputy U.N. High Commissioner for Refugees at the time of the events in question (but who no longer holds that position). Plaintiffs' letter further stated that they did not intend to proceed against the other defendants named in the complaint. Accordingly, the Court dismissed the case

[2] The U.N. has an internal dispute resolution system pursuant to the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), which specifies that "the staff of the Organization are appointed under regulations established by the General Assembly," *id.* art. 101, para. 1, and Chapter XI of the Staff Regulations of the United Nations, which provides procedures for resolving and redressing allegations of employee misconduct.

with prejudice as against those defendants by order dated July 24, 2007.

II. Interest of the United States

The United States' interest in the immunity issues presented by this case arises from the nation's treaty obligations—which are binding on its courts—to respect the applicable immunities of the U.N. and its officials. *See generally Tachiona v. United States*, 386 F.3d 205, 212 (4th Cir. 2004) ("A corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them."). These immunities arise from the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945) ("U.N. Charter"), and the Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 (entered into force Sept. 17, 1946; for the United States April 29, 1970) (the "General Convention")—both treaties to which the United States is a party. Because these immunities, where applicable, are intended to shield the U.N. and its officials from the burdens of litigation, the question of immunity should be decided at the outset, as a threshold jurisdictional matter. *See De Luca v. United Nations Organization*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994) ("Properly invoked immunity shields a defendant not only from the consequences of litigation's results, but also from the burden of defending themselves.") (internal quotation marks and citation omitted); *see also Tuck v. Pan American Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) ("This shield would

be lost if the merits of a complaint were fully tried before the immunity question was addressed."); *cf. NYSA-ILA Pension Trust Fund ex rel. Bowers v. Garuda Indonesia*, 7 F.3d 35, 39 (2d Cir. 1993) (holding that, before applying "any other rule of law in a case involving a foreign state," the foreign state's immunity must be addressed as a threshold matter).

Pursuant to the foregoing treaties, the U.N. itself is absolutely immune from suit and legal process absent an express waiver. The U.N. Charter provides that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter, art. 105(1). The General Convention fleshes out these privileges and immunities, providing in relevant part that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2. The U.N. has not expressly waived its immunity with respect to this case. To the contrary, it has explicitly affirmed its immunity by letters addressed to the United States' Ambassador to the U.N. dated May 15, 2006 and October 19, 2006 (attached hereto at Tabs B and C, respectively).

The General Convention also governs the immunity of U.N. officials. In particular, the General Convention grants the Secretary-General and all Assistant Secretaries-General -- which include both the High Commissioner and Deputy High

Commissioner for Refugees—"the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law." General Convention, art. V, § 19. The privileges and immunities accorded to diplomatic envoys are specified in turn by the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972) ("VCDR"). Under the VCDR, diplomatic officials sued after leaving office continue to receive immunity "with respect to acts performed . . . in the exercise of [their] functions." *Id.* art. 39(2).[3]

Under U.S. law, it is for the Court to decide the applicability of these immunities.[4] However, in

[3] Beyond these treaty provisions specifically applicable to the Secretary General and Assistant Secretaries-General, the General Convention also provides that U.N. officials generally, whether current or former, are immune from suit and legal process "in respect of words spoken or written and all acts performed by them in their official capacity." General Convention art. V, § 18(a). Similarly, under the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq.*, the officers and employees of any international organization covered by the statute, including the U.N., receive immunity from suit and legal process as to "acts performed by them in their official capacity and falling within their functions as such . . . officers, or employees." 22 U.S.C. § 288d(b).

[4] U.S. courts have broadly interpreted the immunity of officials of international organizations, particularly in the employment context, in the interest of protecting the autonomy of such organizations concerning their own internal affairs. *See Broadbent v. Organization of American States*, 628 F.2d 27, 34-35 (D.C. Cir. 1980); *Mendaro v. World Bank*, 717 F.2d 610, 615-16 (D.C. Cir.1983); *see also, e.g., Van Aggelen*, No. 06 Civ. 8240(LBS), 2007 WL 1121744, at *2

accordance with its treaty obligations to communicate the views of the Secretary-General, *see* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, 1999 I.C.J. 62, 87-88, *available at* 1999 WL 33210678 (Apr. 29, 1999), the United States hereby conveys to the Court the position of the Secretary-General that the three remaining individual defendants are entitled to immunity in this matter. *See* U.N. Letters attached at Tabs B and C. The International Court of Justice has advised that the Secretary-General's views concerning the scope of immunity owed to U.N. officials should normally be accorded a high degree of deference. *See id.* at 87; *cf. Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 287 (S.D.N.Y. 2001) (noting similar treatment accorded to views of foreign governments concerning the immunities of their officials). The United States is not taking a position on the applicability of official-acts immunity to any of the allegations in this case.

III. Conclusion

The U.N.'s immunity and the individual defendants' official-acts immunities are governed by the principles set forth above. The United States respectfully requests that this letter be docketed

(S.D.N.Y. Apr. 12, 2007); *D'Cruz v. Annan*, No. 05 Civ. 8918 (DC), 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005); *Hunter v. United Nations*, 800 N.Y.S.2d 347 (table), 2004 WL 3104829, at *2, *5 (N.Y. Sup. 2004). On the other hand, official-acts immunity does not encompass purely private conduct. *See People v. Leo*, 407 N.Y.S.2d 941, 944 (N.Y. Crim. Ct. 1978).

and made a part of the record of this proceeding. The United States reserves the right to file a supplemental letter in response to any submissions made by the parties on this issue.

Respectfully,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York

By: /s/ Serrin Turner
SERRIN TURNER
Assistant U.S. Attorney

Encls.

cc: Monika Ona Bileris, Esq. (by email)
Donald Donovan, Esq. (by email)

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK]

October 31, 2007

BY HAND
The Honorable Robert W. Sweet
United States District Judge
Daniel Patrick Moynihan United States
Courthouse
500 Pearl Street, Room 1920
New York, New York 10007-1312

Re: *Brzak, et al. v. United Nations, et al.*,
06 Civ. 3432 (RWS)

Dear Judge Sweet:

On October 2, 2007, the United States submitted a letter in this matter pursuant to 28 U.S.C. § 517 in order to advise the Court of the immunities afforded to the United Nations ("U.N.") and its officials under certain treaty and statutory provisions. On the same date, the U.N. moved to dismiss on immunity grounds. On October 16, 2007, plaintiffs filed a memorandum in opposition to the U.N.'s motion, contending principally that if the Court were to determine that the action should be dismissed on immunity grounds, such a dismissal would "violate the plaintiffs' fundamental rights under the U.S. Constitution found in the 1st, 5th, 7th and 14th amendments." Pls.' Mem. at 5. The United States submits the instant letter in order to respond, briefly, to plaintiffs' argument—which is in essence a challenge to the constitutionality of

the treaty and statutory provisions that govern the immunities of the U.N. and its employees.[1]

Plaintiffs' constitutional challenge is meritless. Fundamentally, their argument conflates various procedural rights guaranteed by the Constitution with a substantive right to a remedy for the specific conduct alleged in their complaint. The latter is nowhere found in the Constitution. *See Christensen v. Ward*, 916 F.2d 1462, 1472 (10th Cir. 1990) (reprinting district court decision adopted by the circuit court, rejecting similar constitutional challenge to sovereign immunity and official immunity defenses raised by federal defendants: "The Constitution does not create a fundamental right to pursue specific tort actions."); *see generally Bowman v. Niagara Mach. and Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987) ("The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate such rights as he may have, as opposed to the extent to which rights actually are extended to protect or compensate him.").

The immunities of governmental entities and officials of various kinds have been accepted as part of U.S. law since the founding. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (noting immunity of the United States); An Act for the Punishment of certain Crimes against the

[1] As stated in our October 2, 2007 letter, the United States is not taking a position on the applicability of official-acts immunity to any of the allegations in this case. We write only to defend the constitutionality of the immunities afforded to the U.N. and its officials as a general matter.

United States, § 25, 1 Stat. 112, 117-18 (1790) (granting absolute immunity to diplomats). While plaintiffs are correct that dismissal of their case on immunity grounds would leave them without a remedy in court, this consequence is an unremarkable, indeed wholly intended, consequence of immunity, the very function of which is to shield against the burdens of litigation where it applies, regardless of the merits of the case. *Cf., e.g., United States v. Bein*, 214 F.3d 408, 413 (3rd Cir. 2000) ("[A]pplication of sovereign immunity, by its very nature, will leave a person wronged by Government conduct without recourse."). If this consequence were sufficient to give rise to a constitutional violation, then no form of immunity would be constitutionally permissible –an absurd result given that concepts of immunity are well-established fixtures of our law and essential, in particular, for the conduct of international relations. *See Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) ("If our plaintiffs are right, it would seem that the due process clause is violated by the immunity enjoyed by foreign diplomats within the United States; where a foreign diplomat has been immune from suit even though, for example, he kills or injures a U.S. citizen while recklessly driving a car. Similarly the due process clause would prevent U.S. diplomats abroad from claiming immunities in foreign courts. The answer of course is that due process is not infringed by the proper enjoyment of immunities derived from lawful sources even if thereby a claimant is frustrated in prosecuting a lawful claim."); *see also Mistretta v. United States*, 488 U.S. 361, 401 (1988) ("[T]raditional ways of conducting government . . . give

meaning to the Constitution.") (internal quotation marks omitted); *accord The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Despite plaintiffs' portrayal of their constitutional arguments as novel, see Pls.' Mem. at 4, courts have specifically rejected such arguments before with respect to the immunities pertaining to international organizations. *See Weinstock v. Asian Development Bank*, 05 Civ. 174 (RMC), 2005 WL 1902858, *3 (D.D.C. Jul. 13, 2005) (rejecting constitutional challenges to immunity afforded to international organizations under the International Organizations Immunities Act ("IOIA"), 28 U.S.C. 288b); *Ahmed v. Hoque*, 01 Civ. 7224 (DLC), 2002 WL 1964806, *7 (S.D.N.Y. Aug. 23, 2002) (rejecting constitutional challenge to diplomatic immunity invoked by foreign minister to the U.N.). As the court explained in *Weinstock*:

> It is axiomatic that Congress can limit the jurisdiction of the lower federal courts. *E.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts . . . ."). One method by which it can do so, and which it employs quite frequently, is to provide by statute that the United States, foreign sovereigns, or certain entities are immune from suit in the district courts. The codification of these immunities is not a constitutional violation.

2005 WL 1902858, at *3 (some citations omitted). By the same token, there is nothing unconstitutional about such immunities being codified by treaty, as are the immunities of the U.N. and its

officials, as well as other foreign officials, such as diplomats and consular officers. *See Ahmed*, 2002 WL 19648806, at *7. Indeed, the immunities of the U.N. and its officials have repeatedly been recognized and respected by this Court over many years, without their constitutionality ever having been called into question. *See, e.g.*, *Van Aggelen v. United Nations*, 06 Civ. 8240 (LBS), 2007 WL 1121744 (S.D.N.Y. Apr. 12,2007); *D'Cruz v. Annan*, 05 Civ. 8918, 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005), *aff'd*, 223 Fed. Appx. 42 (2d Cir. 2007); *McGehee v. Albright*, 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999), *aff'd*, 208 F.3d 203 (2d Cir.2000); *Askir v. Boutros-Ghali*, 933 F.Supp. 368 (S.D.N.Y. 1996); *De Luca v. United Nations Org.*, 841 F. Supp. 531 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir. 1994); *Klyumel v. United Nations*, 92 Civ. 4231, 1993 WL 42708 (S.D.N.Y. Feb. 17, 1993); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987).

Accordingly, this Court should reject plaintiffs' contention that the immunities afforded to the U.N. and its employees under treaty and statutory law violate the U.S. Constitution.[2] I thank the

[2] In addition to challenging the constitutionality of the immunities of the U.N. and its officials, plaintiffs also contend that these immunities violate Article 2 of the International Covenant on Civil and Political Rights ("ICCPR"), *done* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sep. 8, 1992), by depriving them of an effective remedy for their claims. Putting aside that Article 2 does not require remedies of a judicial form, *see* ICCPR art. 2, the ICCPR in any event is not self-executing and thus does not by itself provide the basis for a private cause of action. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 257-58 (2d Cir. 2003).

Court for its consideration of this submission and respectfully request that it be docketed and made part of the record in this matter.

Respectfully,

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